Human Services Projects, Inc. d/b/a Teen Triumph *and* Jake Wallace. Case 32–CA–025262

February 6, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND FLYNN

On June 23, 2011, Administrative Law Judge Jay R. Pollack issued the attached decision. The Charging Party filed exceptions, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Human Services Projects, Inc. d/b/a/ Teen Triumph, Stockton, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.[2]

[1] No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by (1) discharging Charging Party Wallace because of his protected concerted activities concerning the Respondent's decision not to grant a wage increase; and (2) impliedly threatening to discharge employees for engaging in protected concerted activities.

We adopt the judge's finding that Wallace is ineligible for reinstatement. Although we find that Wallace's actions toward Chief Financial Officer Craig Fredericks, immediately following Wallace's June 11, 2010 discharge, did not render him "unfit for further service" under *Hawaii Tribune-Herald*, 356 NLRB 661, 662–663 (2011), we agree that Wallace's November 16, 2010 misconduct toward employee Kay Tiffany, involving a matter unrelated to his discharge, rendered him ineligible for reinstatement and backpay as of November 16.

Member Flynn agrees that Wallace's menacing conduct toward Kay Tiffany warrants denial of reinstatement and backpay beyond November 16. Although Wallace's misconduct on June 11, standing alone, might not, under extant precedent, demonstrate that Wallace is unfit for further service as a child care worker at residential facilities for sex and youth offenders, Member Flynn finds that it tends to support that conclusion.

[2] The judge inadvertently omitted the following standard footnote from par. 2(c) of his recommended Order, which we hereby add: "If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading 'Posted by Order of the National Labor Relations Board' shall read 'Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.'"

D. Criss Parker, for the General Counsel.
Scott Malm (Cassel, Malm, Fagundes), of Stockton, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Oakland, California, on March 22–23, 2011. On August 4, 2010, Jake Wallace (Wallace) filed the charge alleging that Human Services Projects, Inc. d/b/a Teen Triumph (Respondent or the Employer) committed certain violations of Section 8(a)(1) of the National Labor Relations Act (the Act). The Acting Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing on January 21, 2011, against Respondent alleging that Respondent violated Section 8(a) (1) of the Act. Respondent filed a timely answer to the complaint denying all wrongdoing.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the posthearing briefs of the parties, I make the following.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

Respondent, a California nonprofit corporation, has been engaged in the business of providing group home residential care to behaviorally-challenged youths in various offices and facilities located throughout the State of California, including an office in Stockton, California. During the 12 months prior to the issuance of the complaint, Respondent received gross revenues in excess of $250,000. During the same period of time, Respondent purchased and received goods valued in excess of $5,000 which originated outside of California. During the same period of time, Respondent received federal funding in excess of $50,000. Accordingly, Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues

Respondent is a nonprofit corporation that operates six separate residential homes. The residential group homes serve adjudicated sex offenders and adjudicated probation youth ages 14 to 18. Jake Wallace, the Charging Party, began working for Respondent as a child care worker at Respondent's Heather House facility in October 2009. There is no evidence that Wal-

[1] The credibility resolutions have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

lace performed his job in anything but a capable and competent manner prior to May and June 2010. General Counsel contends that Respondent discharged Wallace because he engaged in protected concerted activities. Respondent contends that Wallace was not engaged in concerted activities and that Wallace's conduct was not protected. Respondent contends that Wallace's statements to his supervisors in front of other employees were disloyal, maliciously false and undermined the reputation of Respondent and the supervisors.

B. Facts

Wallace worked as a child care worker at Respondent's Heather House facility. Wallace would be relieved by Desiree Coffee, night-staff employee. Wallace and Coffee routinely discussed wages, staffing levels and other working conditions. During the period from January 2010 through March 2010, Marti Fredericks, Respondent's executive director, and her husband Craig Fredericks, chief financial officer, informed employees that a lawsuit filed by the California Alliance of Child and Family Services against the State of California could result in benefits to employees.

On Friday, May 28, 2010, Respondent convened a regularly-scheduled Friday staff meeting with its employees at Respondent's headquarters. Craig Fredericks expressed concern over the speed with which counties would make good on the payments from the successful lawsuit. Fredericks announced that employees whose wages were cut in February 2009 would have their wage rate restored but that Respondent was not yet in a position to grant any raises or backpay.

After Craig Fredericks spoke, he asked for comments or questions. Wallace spoke up and stated that employees were concerned that they had been promised retroactive pay and raises. Wallace encouraged Fredericks to grant raises. Wallace also asserted that Respondent was cutting corners in staffing. Fredericks disputed Wallace's claims about staffing and Wallace insisted that Respondent was not completely honest about staffing. Wallace also asserted that Respondent's low wages made it difficult for Respondent to hire and retain qualified employees.

After Wallace spoke, employee Tiana Mack stated that she was happy just to have a job. Employee Lisa Watson stated that she had been counting on a raise from Respondent. House Manager Kathy Bonham stated that she was sick and tired of Respondent not fulfilling its promises. House Manager Oliver Glover stated that the staff works hard and deserves more money. Employee Ruben Harper stated that Respondent needed to pay. The meeting then continued, and the employees broke into their individual house meetings.

On June 1, 2010, Wallace wrote a letter to Respondent's Board of Directors. In the letter, Wallace restated his position that Respondent had promised employees wage increases. The letter sought financial information and minutes of Board of Director meetings.

Prior to the staff meeting of Friday, June 4, 2010, Wallace distributed copies of his June 1 letter to employees. At the staff meeting Margo Castaneda, program director, stated that she was going to address the "white elephant" in the room, referring to Wallace's letter to the Board of Directors. Castaneda said that the Board would be responding to Wallace. Castenda said that Board of Directors' meeting minutes could be accessed in Marti Fredericks' office and that Respondent's financial information was available on a website.

During the June 4 meeting, Castenda told employees "if you're disgruntled, if you don't want to work here you can just leave." Employee Wanda Billsbury and house manager Waynesha Fultcher expressed agreement with Castenda's remark.

On Friday, June 4, Wallace received a call from Heather House Manager Grover Crump stating that Castaneda and Crump wanted to meet with Wallace on Monday, June 7. Wallace asked what the meeting was about, and Crump said it had something to do with Wallace's June 1 letter to the Board of Directors. Wallace stated that he was uncomfortable with such a meeting and that he didn't see the need for the meeting because he was expecting a response from the Board of Directors. Wallace was not told the meeting was mandatory nor was he told that he would be disciplined if he did not attend. Crump advised Castaneda that Wallace did not wish to meet with them.

On June 9, Wallace sent a second letter to Respondent's Board of Directors. Castaneda testified that Craig and Marti Fredericks told her on June 10 that they had decided to discharge Wallace. Respondent had prepared Wallace's paycheck so that it could be provided to him on June 11. On Friday June 11, Wallace distributed his June 9 letter to the Board of Directors to his fellow employees. Castaneda announced that the employees would go to their individual house meetings rather than all meet together as a group.

Craig Fredericks summoned Wallace from the Heather House meeting and brought him to Marti Frederick's office. Desiree Coffee accompanied Wallace as a witness. Marti Fredericks informed Wallace that he was being discharged. Wallace asked why he was being terminated and Marti Fredericks answered because of insubordination. Wallace asked for the specific acts of insubordination and Marti did not respond. Wallace argued that Respondent had no basis to fire him. Marti told Wallace he was no longer an employee and had to leave the premises. Wallace refused to accept an envelope which contained his termination letter and final paycheck.

As Wallace was walking back to the Heather House meeting, Craig Fredericks told Wallace that he would have to leave or Respondent would call the police. Wallace said in a threatening manner "I am not leaving, and if you expect me to leave, you are going to have to come and make me leave this facility." Wallace gestured towards Fredericks to come and fight. Wallace told Fredericks to go ahead and call the police.

Wallace told the Heather House employees that he had been terminated. Craig Fredericks told the employees that Wallace was no longer employed and could not be around the employees. Wallace then left the room and went to the larger conference room.

When a police officer arrived, Wallace stated he preferred to stay in the room so there would be witnesses. Wallace told the officer that he believed the discharge was unfair. Eventually, the officer pulled out a billy club and handcuffed Wallace. They went outside where the officer gave Wallace the option of leaving. Wallace said he had already been detained and that the

officer should go ahead and arrest him. The officer again gave Wallace the option of leaving but Wallace did not accept. Wallace was arrested.

On June 14, Wallace received a June 8 warning letter which stated, inter alia;

> (1) On Friday, June 4, 2010, your direct supervisor, Mr. Crump, and his direct supervisor, Margo Castaneda, Program Director, requested to meet with you on Monday, June 7, 2010. You refused to meet with us stating this is a matter with the Board of Directors.
>
> (2) The purpose of the meeting was to address that it was inappropriate for you to circulate your letter during the all staff Friday meeting which caused disruption and what appeared to be animosity amongst the staff. Your letter was addressed to the Board of Directors, Grover Crump and Margo Castaneda and at the time did not involve other staff members.

The termination letter received that same date states that Wallace was terminated for "insubordination and actions and conduct which adversely reflects on the company."

On June 14, 2010, Marti Fredericks filed with the San Joaquin County Superior Court a "Request for Order to Stop Harassment." On August 17, 2010, the Superior Court entered an "Amended Restraining Order after Hearing to Stop Harassment." Wallace claims that he never received notice of this case and thus did not appear at the hearings.

C. Respondent's Defense

Respondent contends that Wallace was not looking toward group action or seeking to initiate action in concert with other employees. Respondent further contends that Wallace was discharged for insubordination. Respondent contends that Wallace was discharged for refusing to meet with Crump and Castaneda and for accusing the Fredericks of lying, cheating and violating the law.

Respondent contends that Wallace became aggressive, antagonistic and threatened Craig Fredericks. Respondent contends that Wallace refused Fredericks' orders to leave the premises and in a threatening manner stated that he was not leaving and that Fredericks was going to make him leave.

Further, Respondent offered evidence that on November 16, 2010 Wallace approached Kay Tiffany, bookkeeper at a post office and engaged in a profanity-laced tirade. Wallace followed Tiffany to her car and continued his profanity laced tirade. Wallace called Tiffany "a criminal and a f— bookkeeper". Tiffany attempted to close her car door, Wallace grabbed the door and would not let her go. Finally, Tiffany closed the car door and drove back to work.

Finally, Respondent obtained evidence that while Wallace operated his children's home several complaints were filed against him. Respondent contends that had it obtained such information prior to Wallace's hire, Wallace never would have been hired.

D. The Discharge of Wallace

Pursuant to Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid and protection. Employees having no bargaining representative and no established procedure for presenting their grievances may take action to spotlight their complaint and obtain a remedy. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 12–15 (1962). Accordingly, an employer may not, without violating Section 8(a)(1) of the Act, discipline or otherwise threaten, restrain, or coerce employees because they engage in protected concerted activities.

The Act protects employees who engage in individual action which is "engaged in with the objective of initiating or inducing group action." *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964); *Owens-Corning Fiberglas Corp. v. NLRB***,** 407 F.2d 1357, 1365 (4th Cir. 1969). Moreover, an employee need not first solicit other employees' views for his activity to be concerted. See *Whittaker Corp.*, 289 NLRB at 933–934 (employee was engaged in concerted activity where, not having had a chance to meet with any employee beforehand, he made a comment in protest as a spontaneous reaction to the employer's announcement that no annual wage increase would be forthcoming). See also *Enterprise Products*, 264 NLRB at 949–950; *Cibao Meat Products*, 338 NLRB at 934. Thus, the Board has held that an employee who protests, in the presence of other employees, a change in an employment term affecting all employees just announced by the employer at a group meeting, is engaged in the initiation of group action. See *Enterprise Products*, 264 NLRB at 949–950. In addition, employees do not have to accept the individual's invitation to group action before the invitation itself is considered concerted. *El Gran Combo*, 284 NLRB 1115 (1987).

Accordingly, I find that Wallace was engaged in the initiation of group action when he, in the presence of other employees, protested Respondent's decision not to grant a wage increase. Further, other employees later expressed a similar view about the wage issue.

I next turn to the question as to whether Wallace's actions were protected. When an employee is discharged for conduct that is part of the res gestae of protected activities, the question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such character as to render the employee unfit for further service. *Dickens, Inc*, 352 NLRB 667, 672 (2008); *Caval Tool Division, Chromalloy Gas Turbine Corp.*, 331 NLRB 858, 863 (2000); *Consumer's Power Co.*, 282 NLRB at 132; *Firch Baking Co.*, 232 NLRB 772 (1977). Employees are permitted some leeway for impulsive behavior when engaged in concerted activity, as the language of the shop is not the language of polite society. *Dries & Krump Mfg., Inc.*, 221 NLRB 309, 315 (1975) *Phoenix Transit System*, 337 NLRB 510, 514 (2002) (even the most repulsive speech enjoys immunity provided it falls short of deliberate or reckless untruth; federal law gives license to use intemperate, abusive or insulting language without fear of restraint or penalty if the speaker believes such rhetoric to be an effective means to make a point) Protection is not denied to an employee regardless of the lack of merit or inaccuracy of the employee's statements, absent deliberate falsity or maliciousness, even where the employee's language is stinging and harsh. *CKS Tool & Engineering, Inc. of Bad Axe*, 332 NLRB 1578, 1586 (2000); *Delta Health Center, Inc.*, 310 NLRB 26 (1991).

Under the circumstances, I find that Wallace's accusations against the Fredericks did not lose the protection of the Act. Wallace argued in good faith that Respondent should grant the wage increase he perceived had been promised to employees and argued his view that Respondent did not properly staff its facilities. I reject Respondent's characterization of Wallace's conduct as malicious. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by discharging Wallace due to his protected concerted activity.

However, subsequent to his discharge Wallace threatened Respondent's bookkeeper Tiffany. This coupled with Wallace's threatening behavior towards Craig Fredericks on the day of the discharge, in my opinion makes Wallace ineligible for reinstatement.

E. Castaneda' Independent Violation of Section 8(a)(1)

At the June 4 staff meeting, Castaneda told employees that if they were not happy with working conditions at Respondent's facilities, they should quit their employment and work elsewhere. By such conduct I find that Respondent violated Section 8(a)(1) of the Act. See *Paper Mart,* 319 NLRB 9 (1995); *Jupiter Medical Center Pavilion,* 346 NLRB 650, 651 (2006).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondent violated Section 8(a)(1) of the Act by telling employees that if they were not satisfied with working conditions they should quit their jobs and work elsewhere.
3. By discharging employee Jake Wallace because of his protected concerted activities, Respondent violated Section 8(a)(1) of the Act.
4. Jake Wallace engaged in post discharge conduct which made him unfit for further service with Respondent.
5. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged Jake Wallace, shall be directed to make Wallace whole for any and all loss of earnings and other rights, benefits and privileges of employment he may have suffered by reason of Respondent's discrimination against them, with interest, from the date of his discharge until November 16, 2010. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus daily compound interest as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Human Services Projects Inc., d/b/a Teen Triumph, its officers agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because of their protected concerted activities,

(b) Threatening employees with discharge for engaging in protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Jake Wallace whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facilities in Stockton, California, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the attached notice to all current employees and former employees employed by the Respondent at any time since June 4, 2010. In addition to physical posting of paper notices, notices shall be distributed electronically such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such manner.

(d) Within 21 days after service by the Region, file with the Regional Director, a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has taken to comply.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT discharge employees because of their protected concerted activities.

WE WILL NOT threaten employees with discharge because of their protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make Jake Wallace whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest, from the date of his discharge until the date he engaged in disqualifying conduct.

HUMAN SERVICES PROJECTS, INC. D/B/A TEEN TRIUMPH